

### REMARKS

At the time the present Office Action was mailed on November 18, 2009, claims 1-5 and 19-21 were pending in this application. By this submission, Applicant has amended claims 1-4 and 19-21, cancelled claim 5 without prejudice, and added new claims 22-32. No new matter has been added. Claims 1-4 and 19-32 are currently pending in this application.

In the Office Action, claims 1-4 and 19-21 were rejected under 35 U.S.C. § 103(a) as being obvious and unpatentable over U.S. Patent No. 5,875,958 to Weiteder ("Weiteder") in view of U.S. Patent No. 5,765,747 to Lawson ("Lawson"). Claims for an invention are not *prima facie* obvious if the primary references do not suggest all elements of the claimed invention and the prior art does not suggest the modifications that would bring the primary references into conformity with the application's claims (*In re Fritch*, 23 U.S.P.Q.2d 1780 (Fed. Cir. 1992); *In re Laskowski*, 871 F.2d 115 (Fed. Cir. 1989)). Applicant submits that the cited references cannot support a *prima facie* case of obviousness.

In an effort to expedite prosecution and to provide clarification, claim 1 has been amended to clarify that the fitment has a tear away membrane with a tamper evident membrane portion disposed across the conduit at a location fully within the conduit intermediate the entrance and exit of the conduit and spaced apart from the circumferential flange, wherein the first wall associated with the top end of the container will be in a plane between the membrane portion and the circumferential flange. The tamper evident membrane portion has a perimeter releasably joined to the inner wall of the conduit whereby the tamper evident membrane portion closes the conduit. The pull ring is affixed to the tamper evident membrane portion adjacent to the minor portion of the conduit and localizes an initial tear away force applied through the pull ring to the tamper evident membrane portion at the minor portion to reduce the force needed for initiation of tearing away of the tamper evident membrane portion from the inner wall of the conduit. Claim 1 has also been amended to clarify that the fitment has a cap

member pivotally connected to the wall defining the conduit. The cap has an annular receiving area between first and second annular projections, and the annular receiving area is configured to receive therein in a sealing engagement an outboard rim of the second wall to thereby releasably close and seal the conduit against the passage of the contents of the container therethrough.

As previously discussed, Weiteder discloses a cuboid flat gable composite package with a low profile pouring element. Weiteder fails to disclose or suggest several elements of the fitment as claimed. For example, Weiteder fails to disclose or suggest a fitment as claimed with a circumferential flange member that engages the top wall of the container in circumscribing relationship to an opening in the container's top wall, a second wall defining a conduit with at least an exit end having a substantially ellipsoidal planar cross-sectional geometry with at least one major portion and at least one minor portion, and a tear away membrane with a tamper evident membrane portion disposed across the conduit at a location fully within the conduit intermediate the entrance and exit of the conduit and spaced apart from the circumferential flange wherein the first wall associated with the top end of the container will be in a plane disposed between the membrane portion and the circumferential flange.

Weiteder, on the other hand, specifically teaches a cuboid package with an open area 5 in a package surface 1A through which the contents of the package can pass. Weiteder states that an "opening aid 6 is applied in accordance with the invention on the package gable in the interior of the open area 5, as is shown in particular in FIG. 4...the opening aid 6 is provided with a base plate 7 and a handle means 8 on the base plate 7 for lifting the same." Weiteder, col. 3, lines 58-63 (emphasis added). Accordingly, the top of the cuboid package has an opening, and the opening is temporarily sealed with the opening aide that fits into and covers the opening in the top wall of the package. Applicant notes that Weiteder also has a pouring element 2 that is rigidly connected to the top of the package and is positioned on top of the opening surface around the opening and around the opening aid 6, so that the opening surface extending across the opening is below the pouring element. See, Weiteder, col. 3, lines 43-48, and FIGS 5-7.

Accordingly, the opening aid is separate from and spaced apart from the pouring element. Therefore, Weiteder does not teach or suggest the claimed fitment with, *inter alia*, the tear away membrane with a tamper evident membrane portion disposed across the conduit at a location fully within the conduit intermediate the entrance and exit of the conduit and spaced apart from apart from the circumferential flange wherein the first wall associated with the top end of the container will be in a plane disposed between the membrane portion and the circumferential flange.

The Examiner asserted in the Office Action that Weiteder only failed to show the claimed feature of the circumferential flange affixed to the inner surface of the top wall and the tear away member dispose fully within the fitment conduit, but that Lawson discloses such features. Applicant respectfully submits that Weiteder can not be properly combined with Lawson to support the Section 103 rejection. Applicant directs the Examiner to Weiteder at col. 1, line 59 – col. 2, line 3, which states:

"the present invention is based on the object of providing and further developing a cuboid flat gable composite package...so that the overall height of the pouring element used is reduced and a perfect pouring is reliably ensured. With respect to the flat gable composite package, the solution to this object consists of omitting the carrier layer in the zone of the opening area and of providing on the package gable in the interior of the opening area which is sealed over an opening aid for pulling out the composite portion situated in the zone of the opening area."

Weiteder further states at col. 3, lines 1-6:

"It is clear that in accordance with the invention the overall height of the pouring element can be reduced considerably as compared with the current state of the art, because a circular closing strap causing a predetermined distance between closing lid and flange of the pouring element is no longer required."

Accordingly, Weiteder specifically teaches away from a fitment as claimed with a tamper evident membrane portion disposed across the conduit at a location fully within the conduit intermediate the entrance and exit of the conduit and spaced apart from apart from the circumferential flange wherein the first wall associated with the top end of

the container will be in a plane disposed between the membrane portion and the circumferential flange.

Contrary to the Weiteder, Lawson teaches a pour spout with a round conduit and an inner seal 24 in the conduit above the inner and outer flange members 26 and 28. Such a configuration increases the height required for the spout and the associated round removable cap. Modifying Weiteder to provide a seal within the conduit of the pouring element of Lawson, as suggested by the Examiner, would increase the required height of the pouring element, thereby destroying the intended function and objective of Weiteder of "providing and further developing a cuboid flat gable composite package...so that the overall height of the pouring element used is reduced." Therefore, Weiteder teaches away from the combination with Lawson, and the only suggestion of a modification to the pouring element of Weiteder as suggested by the Examiner would be apparent to one skilled in the art after fully understanding Applicant's disclosure, utilizing improper hindsight analysis based upon Applicant's disclosure as a blue print for any necessary modifications, which would be in direct contradiction to the teaching of the primary reference. Therefore, Weiteder can not be properly combined with Lawson as a secondary reference as suggested by the Examiner to support the Section 103 rejection.

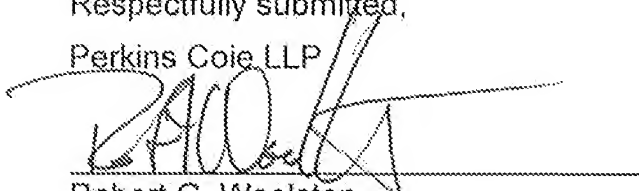
Applicant further submits that even if the pouring spout of Weiteder were combined with the round pouring spout of Lawson to provide a circumferential flange and a tear away member, as suggested by the Examiner, the resulting pouring spout would still not include each and every feature of the fitment claimed by Applicant. For example, the references alone or in combination provide no teaching or suggestion of a fitment as claimed with a circumferential flange, a second wall defining a conduit having an exit end with a substantially ellipsoidal planar cross-sectional geometry with a major portion and a minor portion, and a tear away membrane with a tamper evident membrane portion and a pull ring adjacent to a minor portion of the conduit and that localizes an initial tear away force applied through the pull ring to the tamper evident membrane portion to reduce the force needed for initiation of tearing away of the tamper

evident membrane portion from the inner wall of the conduit at the minor portion. The references further fail to teach or suggest fitment as claimed with a cap member pivotally connected to the wall defining the conduit, wherein the cap has an annular receiving area between first and second annular projections, and the annular receiving area is configured to receive therein in a sealing engagement an outboard rim of the second wall to thereby releasably close and seal the conduit against the passage of the contents of the container therethrough. The only teaching of such a configuration is provided by Applicant's disclosure. Accordingly, the applied references fail to teach or suggest each and every feature of Applicant's fitment as claimed, and therefore fail to support a *prima facie* showing of obviousness. Therefore, Applicant respectfully submits that the claims are patentable over the applied references and are in condition for allowance.

In view of the foregoing, the pending claims comply with the requirements of 35 U.S.C. § 112 and are patentable over the applied art. The Applicant accordingly requests reconsideration of the application and a mailing of a Notice of Allowance. If the Examiner has any questions or believes a telephone conference would expedite prosecution of this application, the Examiner is encouraged to contact Robert G. Woolston at (206) 359-8000.

Respectfully submitted,

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Date: March 23, 2010

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